Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, **vs.** **STEVEN CAMBRA, Warden,** Respondent.	No. C 97-2232 FMS (PR) **ORDER GRANTING PETITIONER'S MOTION TO STAY FEDERAL HABEAS PETITION**

Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court on April 23, 1997. Because the petition contained both unexhausted and exhausted claims, it was dismissed without prejudice. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 1-2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner promptly refiled his petition alleging an exhausted claim only: the government violated its immunity agreement and denied petitioner his right against self-incrimination and to due process by using information he provided to them against him. The court found that petitioner's claim, liberally construed, was cognizable under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be issued. See July 8, 1997 Order at 2-3.

Petitioner now moves the court to exercise its discretion and stay the instant petition while he exhausts five claims that are pending in the Supreme Court of California and that he presented to that court before he filed his federal petition. Petitioner would amend his federal petition to include his other claims once they are exhausted and thereby avoid piecemeal

litigation in federal court. Respondent contends that staying the instant petition while petitioner exhausts state judicial remedies as to additional claims would constitute staying a "mixed" petition.

This court must dismiss a petition containing both unexhausted and exhausted claims. See Rose v. Lundy, 455 U.S. 509, 522 (1982); Greenawalt v. Stewart, 105 F.3d 1268, 1273-74 (9th Cir.), cert. denied, 117 S. Ct. 794 (1997). It "has discretion to stay a petition [that] it may validly consider on the merits," however. See id. at 1274. It may, for example, stay, rather than dismiss, a valid petition containing only exhausted claims to give the petitioner time to exhaust newly-discovered claims in state court. See Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993), cert. denied, 513 U.S. 914 (1994).

The instant petition only contains an exhausted claim and therefore may be stayed; however, a stay should be granted in exceptional cases only. The claims petitioner seeks to pursue must be cognizable under § 2254; there must be a likelihood of prejudice to petitioner if the stay is not granted; and there must be no evidence that the motion for a stay is brought to delay, to vex, or to harass, or that the request is an abuse of the writ. See id.; see also Greenawalt, 105 F.3d at 1274 (equities favoring stay greatly diminished when petitioner presents issue in context of successive petition). Petitioner presents such an exceptional case.

First, the claims petitioner seeks to pursue–prosecutorial misconduct, incomplete jury instructions, insufficiency of the evidence, improper charging of special circumstance, and denial of due process due to cumulative error–are cognizable under § 2254. Second, the claims likely will be barred by the pertinent one-year statute of limitation if the stay is not granted.[1/]

---

1. The claims also likely will be barred by § 2244 (b) for abuse of the writ if they are raised in a successive petition.

Petitioner contends that because he is in custody he likely will not learn of the Supreme Court of California's decision on his state petition in time to file a federal petition within the one-year statute of limitation. He correctly notes that he will have only five days from the date of the state court's decision to file a federal petition.[2/] Remarkably, neither petitioner nor respondent appear to be aware that the Supreme Court of California denied the petition on July 30, 1997 and that petitioner's claims indeed likely will be time-barred if the stay at issue here is not granted. Third, and most importantly, there is no evidence whatsoever that petitioner's motion for a stay is brought to delay, to vex, or to harass, or that the request is an abuse of the writ. Petitioner filed a federal petition before a new statute of limitation expired on April 23, 1997 and understandably sought to raise all of his cognizable claims (exhausted and unexhausted); when he could not, he agreed to proceed with an exhausted claim only and promptly moved for a stay pursuant to Fetterly in order to preserve his right to federal review of all of his cognizable claims. Petitioner has proceeded expeditiously and in good faith–all the claims he wishes to pursue in federal court in fact now appear to be exhausted.

Under these circumstances, the court will exercise its discretion under Fetterly and Greenawalt and STAY the instant federal petition and proceedings.[3/] In view of the Supreme Court of California's recent decision on petitioner's state

---

2. Petitioner filed his state petition on April 18, 1997, five days before the one-year statute of limitation expired. The statute is tolled while a state petition is pending, see 28 U.S.C. § 2244 (d) (2); however, this means that petitioner will have five days after his state petition is decided to file a federal petition.

3. Again, it must be stressed that a stay is appropriate in exceptional cases only. State prisoners with a valid federal petition should not seek and be granted stays of their federal habeas proceedings simply to search out new claims. See Sterling v. Scott, 57 F.3d 451, (5th Cir. 1995) (federal courts may not be used as "a jurisdictional parking lot"), cert. denied, 116 S. Ct. 715 (1996).

petition, however, petitioner shall file an amended petition containing all exhausted and cognizable claims he wishes to raise in federal court by no later than thirty days from the date of this order.

SO ORDERED.

DATED:

FERN M. SMITH
United States District Judge